Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1472

IGNACIO PENA,

Appellant,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS,
EIGHTH SUPREME JUDICIAL DISTRICT,
EL PASO, TEXAS

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1472

IGNACIO PENA,
Appellant,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, EL PASO, TEXAS

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, Appellee, Southern Pacific Transportation Company, moves the Court to dismiss or, alternatively, affirm the final judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District, El Paso, Texas.

The grounds for this motion are that this case is not within the appeal jurisdiction of this Court, that the

federal question involved was not properly raised and preserved below and that no substantial question is presented which warrants review.

QUESTIONS PRESENTED

Appellee considers the substantive questions presented by this appeal to be as follows:

(1) Whether the Court of Civil Appeals unlawfully deprived Appellant of a substantive federal right by applying the requirements of Texas law to Appellant's purported affidavit filed in a case based on the Federal Employers' Liability Act.

(2) Whether there is any relevant difference between the federal law and the law of Texas defining the requisites of an affidavit.

(3) Assuming the document in question was an affidavit, whether Appellant raised a material issue of disputed fact sufficient to preclude the rendition of summary judgment by the trial court.

STATEMENT OF THE CASE

This appeal presents for review a judgment of a Texas Court of Civil Appeals which purportedly holds a federal statute invalid. 28 U.S.C. § 1257(1) (Supp. 1977). Since Appellant ("Pena" or "Plaintiff") has never specified the rejected statutory provision, it is not surprising that Plaintiff has failed or is unable to comply with Sup. Ct. R. 15(1)(d) and specified the manner in which this holding came about. The only solution to

this dilemma is to review the proceedings in the courts below so that the issues which might concern this Court can be delineated and the point at which they were raised identified.

After rendition of summary judgment in this case by the trial court, Appellant filed a motion for new trial which is reproduced at Appendix D to the Jurisdictional Statement. The first eight paragraphs of this motion dealt exclusively with Pena's assertion that he had raised a genuine issue of material fact under the Texas standard of review and, for this reason, entry of summary judgment was error. In the ninth paragraph, Pena pointed out that the validity of the release upon which Appellee ("Southern Pacific" or "Defendant") based its motion for summary judgment was a question of federal substantive law; a premise which is undisputed. In the tenth and last paragraph of the motion, Pena contradicted his prior exposition on the Texas standard of review by obliquely suggesting that the trial court should have applied the standard for granting summary judgment established by federal courts interpreting the Federal Rules of Civil Procedure. Pena did not suggest to the trial court that the question of what may be considered as evidence on a motion for summary judgment, as opposed to the standard to be applied to such evidence, was a question of federal law, or that failure to apply federal law would unconstitutionally deprive Pena of his federal right to a jury trial.

In the subsequent appeal, Plaintiff reduced his assignments of error to three points which are set out in Appendix A to this motion. Pena first argued that he

had presented sufficient evidence, as that term is defined by Texas law, to raise a disputed fact issue. The second point of error conceded that Rule 166-A of the Texas Rules of Civil Procedure prescribed the standard to be applied to the evidence, but complained that the trial court had misconstrued relevant Texas decisions applying this standard.[1] Finally, Pena argued that the trial court had ignored the federal substantive doctrine of mutual mistake which, if proven, would invalidate his signed release of all claims. Even in the face of arguments by Southern Pacific that Pena's "affidavit" was no such thing under Texas law and Pena had thus presented no summary judgment evidence at all to the trial court, Plaintiff never suggested to the Court prior to its decision that federal law should be applied to this issue. The corollary of this issue, that application of Texas law in this instance would unconstitutionally deprive Pena of his federal right to a jury trial, was also not raised.

Following the decision of the Court of Civil Appeals, Pena completely abandoned the three points of error initially presented to that Court. In his motion for rehearing in the Court of Civil Appeals and application for writ of error in the Supreme Court of Texas, Pena for the first time asserted that federal rather than Texas law must be applied in determining whether the document appearing at Appendix C to the Jurisdictional Statement is an affidavit. And for the first time, there appears the claim that the basis for applying federal procedural law in the state forum is that Plaintiff will otherwise be unconstitutionally deprived of a substantive federal right.

1 Tex. R. Civ. P. 166-A was amended, effective January 1, 1978. References throughout this motion are to the rule in effect on the date judgment was entered and which is reproduced herein as Appendix B.

One further aspect of the record in this case which needs clarification is the basis for the Court of Civil Appeals' decision. At page 10 of the Jurisdictional Statement, Plaintiff suggests that the Court's decision turned on the fact that his "affidavit" was not signed. While the signature of the affiant is clearly required by Texas law, Tex. Rev. Civ. St. Ann. Art. 23(18) (1969), the Court of Civil Appeals did not reach this question. Instead, the decision clearly rested on the fact that Pena did not swear to the truth of the facts set out in the document and, instead, merely "acknowledged . . . that he executed the same for the purposes and consideration therein expressed." Jurisdictional Statement, Appendix C at 2.

ARGUMENT

I

This Case Is Not Within The Appeal Jurisdiction Of This Court

At no point during this proceeding has any Court made a ruling which would even suggest that the validity of any provision of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., has been questioned; much less held invalid. As a result, the Court has no jurisdiction under 28 U.S.C. § 1257(1) (Supp. 1977). *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944), modified, 321 U.S. 754 (1944); *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 224 (1889).

None of the cases cited by Plaintiff in support of jurisdiction were decided on the basis of 28 U.S.C. § 1257(1) (Supp. 1977) or its predecessors. *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U.S. 454 (1915); *Seaboard Air Line R. Co. v. Horton*, 233 U.S. 492 (1914); and *Schlemmer v. Buffalo R. & P. Ry.*, 205 U.S. 1 (1907) were all decided prior to The Act of September 6, 1916, Ch. 448, § 2, 39 Stat. 726. The Act relieved the Supreme Court of its obligatory jurisdiction over FELA decisions by the highest state courts and made such review discretionary. See *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 524-531 (1957) (Frankfurter, J. dissenting). The cases cited by Plaintiff decided subsequent to 1916, *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) and *Miles v. Illinois C. R. Co.*, 315 U.S. 698 (1942), were decided under the Court's certiorari jurisdiction. If this Court has jurisdiction, it clearly arises under the certiorari jurisdiction specified in 28 U.S.C. § 1257(3) (Supp. 1977).

II

The Federal Question Which Appellant Seeks To Have Reviewed Was Not Properly Raised And Preserved Below

In order for this Court to have jurisdiction under 28 U.S.C. § 1257 (Supp. 1977), a substantial federal question must be properly raised in the state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Zucht v. King*, 260 U.S. 174, 176 (1922). Moreover, the proper method of raising the question is normally dependent upon the particular state practice. *Michel v. Louisiana*, 350 U.S. 91, 93 (1955). Where, as here, the highest state court is silent on the question, a

presumption exists that the silence of the state court is due to want of proper presentation. *Street v. New York*, 394 U.S. 576, 582 (1969).

In this case, the precise question of whether federal or state law must govern the definition of an affidavit was not raised in the state courts until Pena moved for a rehearing in the Court of Civil Appeals. Under Texas law, such a delay precluded the Supreme Court of Texas from considering this issue. *Watson v. Glens Falls Insurance Company*, 505 S.W.2d 793, 797 (Tex. 1974); *Texas State Highway Department v. Fillmon*, 150 T. 460, 242 S.W.2d 172, 174 (Tex. 1951).

Even if Plaintiff could be deemed to have raised the question in the trial court, by virtue of paragraph X in the motion for a new trial, and in the Supreme Court of Texas, it is clear the Court of Civil Appeals was not given an opportunity to pass on the question prior to the motion for rehearing. Raising a question in the trial court and one of two appellate courts is insufficient to preserve the question for review in this Court where state procedure permits or requires that the question be pursued at each stage of state court review. *Beck v. Washington*, 369 U.S. 541, 549-54 (1962); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

III

No Substantial Federal Question Is Presented In This Appeal

Plaintiff's assertion that the "affidavit" he filed in the trial court was sufficient under federal law to preclude summary judgment is premised on several

assumptions, none of which are true. The first is that federal law governs what testimony will be considered as evidence in an FELA case filed in a Texas court.

When the federal rights created by the Federal Employers' Liability Act are asserted in the state forum, the necessity arises to make the difficult distinction between substance and procedure in order to determine what law is to be applied. It is clear this Court has gone farther in exercising federal control over what is commonly characterized as state procedure in the context of FELA cases than in any other area. *Rogers v. Missouri Pacific Railroad Co., supra; Dice v. Akron, Canton & Youngstown R. R.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Alabama, supra;* see generally, Hart, *The Relations Between State And Federal Law*, 54 Colum. L. Rev. 489 (1954); Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551 (1960). These decisions, however, have focused on two areas which have no application here; namely the adequacy of a state court FELA plaintiff's pleadings and the amount of proof necessary to submit the issue of liability to a jury or bind a reviewing court to the jury's decision.[2] In view of the specific enunciation of a unique quantum of proof in 45 U.S.C. § 51, and the policy reflected thereby, it is not surprising the Court has mandated applica-

2 One commentator has suggested that *Brown v. Western Ry. of Alabama, supra*, which reviewed the sufficiency of an FELA plaintiff's petition in state court was really concerned with the state court's misconception of the quantum of evidence necessary to recover in an FELA action. Hill, *Substance and Procedure in State FELA Actions — The Converse of the Erie Problem*, 17 Ohio St. L. J. 384, 407 (1956).

tion of a uniform standard of reviewing the sufficiency of the evidence in the face of which unnecessarily burdensome state procedures must give way. While admittedly favoring submission of even the slightest factual dispute to a jury, this uniform standard has never been interpreted to require a jury trial in an FELA case in the absence of any evidence. *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943). The implication that an FELA plaintiff is absolutely entitled to a jury trial, either by virtue of the Seventh Amendment to the Constitution or the Act itself, has been rejected. *Id.*

In this case, the issue is not the quantum of proof or an unnecessary or unreasonable procedural requirement which bars vindication of the federal right, but rather the more fundamental question of whether Texas can establish minimal limits or requirements on the type of testimony which will be received as evidence. The requirement that the truth of the facts set forth by Pena be sworn to, before the testimony in the affidavit will be considered, is hardly of the type of over-exacting local procedure which thwarts the policy underlying the Federal Employers' Liability Act favoring jury trials and the application of a uniform quantum of proof. Unless the procedural rules of the several states are to be totally federalized when their courts are considering FELA claims, and a heretofore unrecognized absolute right to a jury trial exists, this case does not present a substantial federal question.

An even more compelling reason why no substantial federal question is presented for review is that the Texas requirement that an affidavit be sworn to is

identical to the prescription found in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(e); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) at note 16; *Baxter v. Railway Exp. Agency, Inc.*, 455 F.2d 693, 696 (6th Cir. 1972), cert. denied 409 U.S. 847 (1972); *Local Union No. 490, U. R. C. L. & P. Wkrs. v. Kirkhill Rubber Co.*, 367 F.2d 956, 958 (9th Cir. 1966). The fact that Pena was sworn by a notary is meaningless unless one proceeds to determine the purpose for which he was administered the oath. The acknowledgement demonstrates that Pena was not swearing to the truth of any facts. The court in *Miller Studio, Inc. v. Pacific Import Co.*, 39 F.R.D. 62, 65 (S.D.N.Y. 1965) considered this precise issue and reached the same conclusion.[3] See also *United States v. Galato*, 171 F.Supp. 169, 170 (M.D.Pa. 1959).

IV

No Material Issue Of Disputed Fact Exists Even Should Federal Law Be Applied

While not intending to present a brief on the merits, Southern Pacific would suggest that even if Pena's affidavit is considered as such, Plaintiff failed to raise a material issue of disputed fact. Specifically, even if this Court accepts the statements in Pena's affidavit as true, there is no fact issue to support a claim that Pena's execution of a release was premised on a

3 As has been noted, the issue at this stage of the proceedings is not whether Pena also had to sign this document. Even so, the case cited by Pena for the proposition that his signature was not necessary under federal law, *Farm Bureau Mut. Ins. Co. v. Hammer*, 83 F.Supp. 383 (W.D.Va. 1949), is not in point. Plaintiff also fails to note the case was reversed on other grounds at 177 F.2d 793 (4th Cir. 1949).

mutual mistake. There is nothing in the affidavit which tends to show that anything Pena was told by Southern Pacific or its agents was untrue, or that Pena had a back injury which was unknown at the time the release was signed and only became known at a later date. *Taylor v. Chesapeake and Ohio Railway Company*, 518 F.2d 536 (4th Cir. 1975); *Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F.2d 819 (9th Cir. 1949); *Kiloski v. Pennsylvania Railroad Co.*, 96 F.Supp. 321 (D.Del. 1951). The absence of disputed facts would have entitled Southern Pacific to summary judgment whether the trial court had applied Rule 56 of the Federal Rules of Civil Procedure or Rule 166-A of the Texas Rules of Civil Procedure in passing on the motion. The standard of review under each rule is, in any event, identical. As a result, the Court in disposing of this case need not resolve the questions of which law the affidavit must satisfy and whether a state or federal standard of review must be utilized.

TREATING THE APPEAL PAPERS AS A PETITION FOR CERTIORARI, CERTIORARI SHOULD BE DENIED

Since Plaintiff has improvidently appealed from the judgment of the Court of Civil Appeals, this Court pursuant to 28 U.S.C. § 2103 (Supp. 1977) must consider the papers as a petition for certiorari. Certiorari should be denied for the reasons heretofore discussed and for the additional reason that Plaintiff has generally failed to comply with Rule 23 of this Court's Rules. At a minimum, Plaintiff has failed to comply with paragraphs 1(f), 1(j) and 4 of Rule 23.

CONCLUSION

This Court is ultimately being asked to endow with probative value a document which warrants none under federal or state law. Invoking the supremacy of federal law to overturn the reasonable application of Texas law to the "affidavit" filed by Plaintiff in this case is of no avail since the result would have been the same in a federal forum. For this and the other reasons discussed above, the appeal should be dismissed or affirmed or, treating the papers as a petition for certiorari, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Motion to Dismiss or Affirm have been served to all parties required to be served as follows:

Mr. David Q. Haag
5959 West Loop South, Suite 666
Houston, Texas 77401

Plato Papps
Machinists Building
1300 Connecticut Avenue, S.W.
Washington, D.C. 20036

by United States Mail, postage prepaid and properly addressed, on this ____ day of May, 1978.

FERDINAND C. MEYER, JR.

APPENDIX A

Excerpts from Brief for Appellant, Ignacio Pena v. Southern Pacific Transportation Company, No. 15764, In The Court of Civil Appeals For the Fourth Supreme Judicial District of Texas, San Antonio, Texas

NO. 15764

IN THE
COURT OF CIVIL APPEALS
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
OF TEXAS
SAN ANTONIO, TEXAS

IGNACIO PENA,
Appellant

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellee.

BRIEF FOR APPELLANT

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* * *

[3] *APPELLANT'S CONTENTIONS*

THE TRIAL COURT ERRED IN GRANTING THE DEFEDANT'S MOTION FOR SUMMARY JUDGMENT.

A. *Plaintiff presented sufficient evidence to raise a genuine issue as to material disputed facts.*

B. *The trial court improperly applied Texas Rule 166-A and the cases thereunder as to the granting of Summary Judgment.*

C. *This action is maintained under the Federal Employer's Liability Act. Trial court erred in not adhering to federal law concerning mutual mistake as a ground for voiding a release and concerning the granting of Summary Judgment.*

APPENDIX B

Tex. R. Civ. P. 166-A (1976), as amended Tex. R. Civ. P. 166-A (1977):

Rule 166-A. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that, except

as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. Amended by orders of October 1, 1951, effective March 1, 1952, and July 20, 1966, effective January 1, 1967; order of July 21, 1970, effective January 1, 1971.